SIME BANK BERHAD

v.

LAL BHOJRAJ KHANCHANDANI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-1303-1997]
8 MARCH 1999

CIVIL PROCEDURE: *Action - Charge action under court-appointed receivership - Whether leave necessary - Whether ought to be granted to cure action commenced without leave*

CIVIL PROCEDURE: *Costs - Costs of plaintiff's leave application for charge action under court-appointed receivership - Whether should be ordered for plaintiff - Whether should be dependant on outcome of setting-aside application on appointment of receivers*

The plaintiff, as chargee, commenced an order for sale action ('the charge action') against the 3rd defendant's land without first obtaining leave of the court. In view of the fact that upon an earlier application by the plaintiff, receivers had been appointed by the court over the business, assets and property of the 3rd defendant, the plaintiff then obtained a postponement of the charge action to seek leave to proceed with the said action. This instance was the leave application by the plaintiff.

The 3rd defendant argued that leave ought not to be granted to cure an action that had been commenced without leave. Further, it was argued that costs of the present leave application be made dependant on the outcome of the 3rd defendant's setting-aside application on the appointment of receivers.

Held:

[1] Leave ought not to be refused unless it is perfectly clear that there is no foundation for the claim of the person seeking leave. In this instance, it had not been argued that such was the case with the claim of the plaintiff in the charge action.

[2] There is no statutory provision which renders it necessary for a litigant to obtain the permission of the court by which the receiver has been appointed previous to the institution of the suit against him. Also, there is no intelligible principle to defend the position that as the suit has been instituted without leave previously obtained, it must necessarily be

dismissed, and that it is not open to the court to stay proceedings in the suit to enable the plaintiff to obtain leave of the court to proceed with the suit against the receiver (*Banku Behari Dey v. Harendra Nath Mukerjee*).

[3] There was justice in the 3rd defendant's suggestion that the costs of the present leave application be made dependant on the outcome of its application on the setting aside of the appointment of the receivers. Further, the 3rd defendant had not been frivolous in opposing the leave application. There was a point meriting consideration in its argument that leave ought to be obtained before an action is commenced and that it ought not to be granted to cure an action that has been commenced without leave.

[Application allowed; costs to be costs in the cause of the setting aside application.]

Case(s) referred to:
Banku Behari Dey v. Harendra Nath Mukerjee [1910-1911] Vol XV CWN 54 ***(foll)***
Lane v. Capsey [1891] 3 Ch 411 ***(foll)***
Tai Kwong Goldsmiths & Jewellers v. Yap Kooi Hee [1995] 1 MLJ 3 ***(refd)***
Zainal Abidin bin Putih v. Che Wan Development Sdn Bhd [1992] 2 MLJ 241 ***(refd)***

Legislation referred to:
National Land Code 1965, s. 242

Other source(s) referred to:
Company Receivers and Managers, O Donovan, 2nd end, p 7631
Receivers and Administrators, Kerr, 17th edn, p 146

For the plaintiff - Wong Kean Kheong (Andrew Chew with him), M/s Lee Hishammuddin
For the defendants - Richard Lee; M/s Cheah Teh & Su
For the receivers and managers - G Rajasingam; M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:

On 6 November 1996 the third defendants, Vimtex Sdn Bhd, charged a land of theirs to the plaintiffs under s. 242 of the National Land Code to secure the repayment of certain loans granted by the plaintiffs to the third defendants.

The loan agreement having been defaulted, on 6 November 1997 the plaintiffs recalled the loans.

On 19 December 1997, upon the application of the plaintiffs made in this action, receivers were appointed by the court over the business, assets and property of the third defendants.

On 6 May 1998 the plaintiffs, as chargees of the land, filed an application (S5-24-366-98) for an order for sale of the land under s. 256 of the National Land Code ("the charge action"). On 1 October 1998 the plaintiffs obtained a postponement of the charge action to enable them to seek leave to proceed with it in view of the fact that receivers had been appointed by the court over the assets of the third defendants. The present application is the leave application, filed in this action on 4 November 1998.

This application being one for leave, it must have been prompted by a belief or fear on the part of the plaintiffs' solicitors that in law, leave would be necessary to proceed with the charge action in view of the fact that receivers had been appointed by the court over the assets of the third defendants. Learned counsel for the plaintiffs, however, spent some time in submitting that the authorities, particularly *Zainal Abidin bin Putih v. Che Wan Development Sdn Bhd* [1992] 2 MLJ 241 and *Tai Kwong Goldsmiths & Jewellers v. Yap Kooi Hee* [1995] 1 MLJ 3, do not go so far as to require leave for bringing a charge action to enforce the plaintiffs' statutory rights as a secured creditor, particularly as the action is not one against the receivers.

I do not find that I need to decide the question whether leave is necessary, except to say that certain authorities cited in submission seem to afford some room for arguing that leave is necessary. I shall proceed on the assumption that leave is necessary and decide only whether leave ought to be granted.

As to whether leave ought to be granted, I am content to rely on *Lane v. Capsey* [1891] 3 Ch 411, which lays down that leave ought not to be refused unless it is perfectly clear that there is no foundation for the claim of the person seeking leave. It has not been argued that such is the case with the claim of the plaintiffs in the charge action.

The only point raised by learned counsel for the third defendants in submitting against leave that I need mention is that leave ought not to be granted to cure an action that has been commenced without leave. The following statement at p. 146 of Kerr on *Receivers and Administrators*, 17th Edn, was cited: "The court will not allow the first step to be taken by anyone in the action, whether of ejectment or otherwise, against a receiver without an application having been first made to the court for permission to take it". In the context of this case, the more fitting venue for raising that statement is the court that is seized of the charge action, but that court has already allowed a postponement of the

charge action to enable leave to be obtained. Moreover, there is a statement at p. 7631 of *Company Receivers and Managers* by O Donovan, 2nd Edn, that "The court may even allow an applicant to continue proceedings commenced without leave in another court".

I think the correct position is stated in *Banku Behari Dey v. Harendra Nath Mukerjee* [1910-1911] vol. XV CWN 54. I quote:

> The learned Vakil for the Receiver has contended upon the authority of a decision of this Court in the case of *Pramatha Nath Gangooly v. Khetha Nath Banerjee,* [I.L.R. 32 Cal. 270; s.c. 9 C.W.N. 247 (1904)] that the consent of the Court to an action against a Receiver appointed by the Court, is a condition precedent to the right of the party to sue and the omission cannot be rectified by a subsequent application for leave to continue an action brought without such permission. After careful consideration of the decision on which reliance has been placed, we regret we are unable to follow it as well-founded on principle. There is no statutory provision which renders it necessary for a litigant to obtain permission of the Court by which the Receiver has been appointed previous to the institution of the suit against him. No doubt if such a litigant makes an attempt to disturb the possession of the Receiver, he may be guilty of contempt of Court and may thus render himself liable to be dealt with summarily. It may also be conceded that if such a suit is brought, the Court in which the suit has been instituted will not permit the Plaintiff to harass the Receiver till permission of the Court by which the Receiver was appointed has been obtained. But we are unable to appreciate upon what intelligible principle the position can be defended that because the suit has been instituted without leave previously obtained, it must necessarily be dismissed, and that it is not open to the Court to Stay proceedings in the suit with a view to enable the Plaintiff to obtain leave of the Court to proceed with the suit against the Receiver.

I allow the application and make an order in terms of its prayer (1).

There is an application by the third defendants, yet to be disposed of, for, *inter alia,* the setting aside of the appointment of the receivers. It was submitted by learned counsel for the third defendants that in the event of the plaintiffs succeeding in this leave application, costs should not be awarded against the third defendants but should be made costs in the cause of the setting-aside application, that is to say, should depend on the outcome of that application, so that the third defendants would have to bear the costs of the present leave application only if they should fail to have the appointment of the receivers set aside. The thinking is that were it not for the appointment of the receivers, which the plaintiffs themselves sought and obtained, this application for leave would not have been made and the question of the third defendants having to bear the costs would not have arisen. It would follow that if the third defendants should succeed in having the appointment of the

receivers set aside, they should be awarded the costs of the present leave application even though they have chosen to oppose it but have not been successful in opposing it.

Were there to be no question of setting aside the appointment of the receivers, which has necessitated the plaintiffs' leave application, I would order costs for the plaintiffs because, although in their leave application they have prayed in general terms for costs in the cause, the third defendants have strenuously opposed the application and have failed in their opposition. But with the third defendants hoping to succeed in having the appointment of the receivers set aside, I can clearly see the justice in the suggestion that the costs of the present leave application be made dependant on the outcome of the setting-aside application, and I would accede to the suggestion unless I can find that the third defendants had been frivolous in opposing the leave application, that is to say, that they could furnish no ground whatsoever for opposing it that merited consideration. I am unable to so find. There was a point meriting consideration in the third defendants' argument that leave ought to be obtained before an action is commenced and that it ought not to be granted to cure an action that has been commenced without leave.

I therefore order that the costs of this application be costs in the cause of the setting-aside application, which is encl (75).